

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

v.

FULLERTON JOINT UNION HIGH
SCHOOL DISTRICT AND MERCED
COUNTY MENTAL HEALTH,

OAH Case NO. N2005100231

MERCED COUNTY MENTAL HEALTH,

Petitioner,

v.

STUDENT,

Respondent

OAH Case NO. N2005080918

DECISION

Richard M. Clark, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, State of California, heard this matter from April 17 to April 21, 2006, in Fullerton, California.

Petitioner (Student) was represented by attorney Tania Whiteleather. Student's mother was present during the hearing on Student's behalf. Vikki Rice, educational advocate for Student, was also present for a majority of the hearing. Student's mother has been designated Student's conservator.

Respondent Fullerton Joint Union High School District (District) was represented by attorneys Adam Newman and Jabari Willis. Helen Rodriguez, Director of Special Education for District, was present during the hearing.

Respondent Merced County Mental Health (MCMH) was represented by attorney David Larsen. Marilyn Wilson, case worker for MCMH, was also present on behalf of MCMH.

Originally five issues were to be decided at the due process hearing.¹ On April 17, 2006, the first day of hearing, the District and Student entered into a settlement agreement regarding issues one and two. Both parties agreed that the ALJ did not need to render a decision on those issues. The District, MCMH and Student agreed that issue three was the only remaining issue filed by Student that involved all parties and that Student's issue four only involved Student and MCMH. On April 20, 2006, the fourth day of hearing, Student withdrew issue number three which concerned placement of Student at Affinity Ranch (Affinity) in Montana after extensive telephonic testimony by Jeffery Scoggins, a counselor at Affinity. On April 20, 2006, all issues having been settled or withdrawn against the District, the District was dismissed from the hearing, which left Student's issue four and MCMH's issue for decision.

Oral and documentary evidence were received during the hearing and that portion of the hearing was closed on April 21, 2006. The record remained open for the submission of written closing arguments to be received no later than May 5, 2006.² Counsel waived any time requirements for a written decision on the condition that a decision be issued no later than June 2, 2006.

ISSUES

1. Did MCMH deny Student a free appropriate public education (FAPE) when it terminated Student's one-to-one aide in December 2005?

2. Must Student's mother consent to treatment and provide releases of information for MCMH to properly visit, evaluate and treat Student for mental health services?

¹ The issues for decision are taken from the prehearing conference order issued on April 12, 2006.

² On May 5, 2006, in addition to its closing argument, MCMH submitted a packet of special education administrative decisions related to compensatory education from California and Hawaii. MCMH requested that the ALJ take judicial notice of the information. This information was independent of the closing argument which had a 20-page limit. The ALJ hereby takes judicial notice of the information contained in the packet. (Evid. Code §452.)

FINDINGS OF FACT

1. Student is currently 18 years old and receives special education services through Fullerton Joint Union High School District (District) with mental health services provided by Merced County Mental Health (MCMH). Student is eligible for special education under the category of emotional disturbance. At the time of the hearing, Student was living at home with his mother and had been since Christmas break in December 2005. Student's Individualized Education Plan (IEP) requires residential placement and attendance at a non-public school (NPS).

2. Student attends Sea Star School (Sea Star), a NPS. Prior to December 2005, Student resided at Pinnacles Group Home (Pinnacles) which only provided residential placement for individuals up to age 18. Student's turned 18 years old on October 29, 2005, and Pinnacles agreed to maintain Student's placement until November 5, 2005, while Student's IEP team located a new residential facility even though Student had "aged out" of Pinnacles. Age was the only reason that Student had to leave Pinnacles. Pinnacles is a level 14 facility, the highest security designation.

Therapeutic Behavior Services/One to One Aide

3. Student had a one-to-one aide at Sea Star provided by the District to assist Student with behavior and instruction. The educational aide worked under the direction of Student's classroom teacher who designed the daily tasks for Student and used the aide to help Student complete the tasks. Thomas Birckel, Student's special education teacher at Sea Star, testified and established that Student was able to access his educational program at Sea Star. Student's behavioral issues at Sea Star decreased after September 2005, even though Student was hospitalized at University of California, Irvine, Medical Center (UCI) on October 4, 2005, due to behavioral issues. Student's has had six or seven behavioral incidents while at Sea Star since March 2006.

4. A search for a new residential facility for Student began in October 2005, and MCMH offered to provide Therapeutic Behavioral Services (TBS) for Student to assist in Student's transition to the new facility. TBS is a Medi-Cal provided service that lasts for a maximum of 60-days unless reauthorized by Medi-Cal. TBS is not part of an IEP because TBS is not an educational service, but instead is a behavior related service that assists with placement.

5. After an IEP meeting held on October 14, 2005, Student's mother wrote a letter addressing her concerns about the meeting and noted in the letter that "UCI will not release [Student] to Pinnacles unless TBS is in place...." There is no other reference to TBS in the October 14, 2005 IEP.

6. At the October 24, 2005 IEP meeting, TBS was discussed and Student's mother declined to sign a release for MCMH to conduct an assessment for TBS. Marilyn Wilson, Student's case manager at MCMH, attended the IEP meeting in person. The notes

from the IEP meeting indicate that MCMH “laid [sic] out for the team the process to obtain TBS services.” MCMH agreed to use a Functional Analysis Assessment (FAA) dated October 19, 2005, conducted by Dr. G. Roy Mayer, and a letter dated October 14, 2005, from Dr. Gail Fernandez and Dr. Visant Sanathara who treated Student at UCI, as the required TBS assessment. The October 24 IEP states that TBS is required and that TBS will be provided within one week but “the course of services, frequency and duration will be determined after an assessment by a provider.” The IEP does not list TBS as part of Student’s special education program and does not otherwise list MCMH as providing a one-to-one aide. Student’s mother signed the IEP.

7. On October 28, 2005, MCMH sent a letter to Pinnacles stating that MCMH would pay for a one-to-one aide until TBS was in place November 1, 2005.

8. On November 2, 2005, Student began receiving TBS from James Barile through a non-public agency (NPA) called Five Acres. Mr. Barile was a trained TBS provider and had been providing TBS services for six years. He evaluated Student and determined Student’s goals under the service. Mr. Barile had a member of the Sea Star staff sign the consent for treatment even though the staff person was not listed as Student’s guardian. Mr. Barile provided TBS at Sea Star and at Pinnacles. He went to Student’s mothers’ home on at least one occasion and spoke regularly by phone with Student’s mother. Student responded well to TBS and he met the goals that Mr. Barile established. Mr. Barile ended TBS towards the end of December 2005, but notified Student’s mother that TBS could be restarted, if necessary, and that it could be conducted in her home since Student was then living at home pending an anticipated move to Montana. Mr. Barile felt that the supervision structure at Pinnacles was adequate to meet Student’s behavioral needs. Mr. Barile spoke to Student’s mother one time after January 2, 2006, and learned that Student was doing fine. Mr. Barile made other attempts to contact Student’s mother by phone but his messages were not returned. Student was “discharged” from TBS on January 2, 2006.

9. At the November 15, 2005 IEP meeting, Ms. Wilson and Fernanda Saude, attorney for MCMH, attended by telephone. The special education program language lists “residential, room + board + mental health/therapeutic services-MCMH” from November 15, 2005 until April 7, 2006, daily for “7 days/week” at the residential location. The IEP also calls for an instructional assistant to be provided by the District at the NPS, 5-days per week for 7 hours per day. The only reference to TBS is a note that the attorney for the District asked for clarification as to MCMH recommendation for TBS. The November 15 IEP was called to discuss Student’s placement and to review the results of an FAA but did not directly discuss other services for Student. Student’s mother signed the IEP.

10. Student’s mother and Student’s educational advocate testified that they did not know TBS was a temporary service, but only learned that TBS was temporary through testimony at the due process hearing. The testimony and exhibits from MCMH persuasively established that TBS was the service discussed and contemplated at the October 24 IEP and that no other one-to-one service from MCMH was contemplated or considered at any other

IEP meeting. To the extent that a conflict exists between MCMH and Student's mother and educational advocate, the ALJ is persuaded that MCMH's interpretation is more persuasive.

Consent for Mental Health Treatment

11. MCMH could not properly treat and provide services to Student without parental consent to release Student's records. MCMH sought information related to Student's medical history, transfer plans, family history, history of placement, information related to Student's progress at home and school and other pertinent information to the monitoring of Student so that MCMH could coordinate services for Student. MCMH's requests also asked for social and academic functioning, diagnosis, attendance and progress; access to cumulative folders that showed attendance, grade reports, IEP reports, classroom behavior and disciplinary reports; medication taken; psychological testing results; family history and placement history for the evaluation, treatment planning and coordination of services for Student. MCMH asked to share that information with all relevant service providers including the District, NPS, and the residential placement. MCMH began asking Student's mother for consent to receive information about Student in February 2005. This was followed by regular attempts to gain the same information until August 2005 when MCMH filed a request for due process hearing. MCMH requested records that contained information that was confidential but not privileged, such as therapist notes.

12. MCMH has an independent duty to monitor Student's placement, progress and services at his residential placement which includes a requirement that MCMH have regular contact with the residential and school placements. To best provide services to Student, MCMH needed to take a coordinated approach to services and treatment, particularly when one intervention might be working in one setting but not in another. MCMH told Student's mother that mental health services would not be stopped if she did not consent, but that consent was needed to provide better and more directed services. The information would assist MCMH in suggesting other services or placements that might better meet Student's needs. IEP information alone was not sufficient to meet MCMH's duty to monitor Student because that information was not always current.

13. On July 28, 2005, at an IEP attended by Student's educational advocate on behalf of Student's mother who was unavailable due to a scheduling miscommunication, parent notified MCMH that it was to have no contact with Student unless approved by Student's mother or advocate. Sea Star was not providing any information to MCMH because the parent indicated they were not to. MCMH was not receiving reports from the District regarding Student's behavior unless it was discussed at an IEP. Student's mother stated during the due process hearing that she never denied MCMH access to information discussed at IEP meetings but that she felt such information was all MCMH needed regarding Student.

CONCLUSIONS OF LAW

1. Under the federal Individuals with Disabilities Education Act (IDEA) and state law, students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. §1400, et seq.; Ed. Code §56000, et seq.) The term “free appropriate public education” means special education and related services that are available to the student at no cost to the parents, that meet the State educational standards, and that conform to the student’s individualized education program (IEP). (20 U.S.C. §1401(9).) “Special education” is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. §1401(29).) The term “related services” includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. §1401(26).) California provides that designated instruction and services (DIS), California’s term for related services, shall be provided “when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program.” (Ed. Code §56363, subd. (a).)

2. Once a child is identified under the IDEA as handicapped, the local education agency must: identify the unique educational needs of that child by appropriate assessment, create annual goals and short-term benchmarks to meet those needs, and determine specific services to be provided. (Ed. Code §§56300–56302; 20 U.S.C. §1412.)

3. A student’s IEP must be reasonably calculated to provide the student with some educational benefit, but the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student’s abilities. (*Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 198-200.) School districts are required to provide only a “basic floor of opportunity” that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the student. (*Id.* at 201.)

4. The petitioner in a special education administrative hearing has the burden to prove his or her contentions at the hearing. (*Schaffer v Weast* (2005) 546 U.S. ____; [126 S.Ct. 528].)

5. The IEP team shall include, at the discretion of the parent, guardian, or the local educational agency, individuals who have knowledge or special expertise regarding the pupil, including related services personnel, as appropriate. The determination of whether the individual has knowledge or special expertise regarding the pupil shall be made by the party who invites the individual to be a member of the individualized education program team. (Ed. Code §56341, subd. (b)(6).) When a student is determined to be seriously emotionally disturbed and residential placement is recommended, the IEP team is expanded to include a representative of the county mental health agency. (Gov. Code §7572.5, subd. (a).) If residential placement is agreed upon, then the county mental health agency becomes the lead case manager. (Gov. Code §7572.5, subd. (c).)

6. When mental health services are determined to be necessary for a student with a disability to benefit from special education, parental approval is required for provision of mental health services in addition to the consent required under an IEP. (Cal. Code Regs., tit. 2, §60050, subd. (a)(5).) The role of a mental health agency in providing services to a student who is seriously emotionally disturbed includes monitoring the residential placement and program. (Cal. Code Regs., tit. 2, §60050, subd. (c)(8)-(9).)

7. The IDEA requires that a due process decision be based upon substantive grounds when determining whether the child received a FAPE unless a procedural violation impedes the child's right to a FAPE, significantly impedes the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefits. (20 U.S.C. §1415(f)(3)(E).)

8. The IDEA inquiry is twofold. The first inquiry is whether the school district has complied with the procedures set forth in the IDEA. The second inquiry is whether the developed IEP provides the student with a FAPE by meeting the following substantive requirements: (1) has been designed to meet Student's unique needs; (2) has been reasonably calculated to provide Student with some educational benefit; and (3) complies with Student's IEP.³

9. As discussed below, Student has not met his burden of proof on the single issue remaining for decision. MCMH has met its burden of proof on its sole issue for decision.

Issue 1

MCMH did not deny Student a FAPE when it terminated Student's one-to-one aide in December 2005.

10. As stated in factual findings 3 and 5 to 10, TBS was the only service that MCMH agreed to provide and MCMH did provide TBS.

11. As stated in factual findings 4 and 10, TBS was independent of the IEP process since it was not an educationally related service.

12. MCMH did not deny Student a FAPE by terminating TBS in December 2005 since Student had met his TBS goals. Therefore, Student has not met his burden on this issue.

³The District was also required to provide Student with a program which educated him in the least restrictive environment (LRE), with removal from the regular education environment occurring only when the nature or severity of her disabilities was such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. §1412(a)(5)(A); Code § 56031.) LRE is not an issue in this case.

Issue 2

Student's mother must consent to treatment and to provide releases of information for MCMH to properly visit, evaluate and treat Student for mental health services.

13. As stated in factual findings 11 and 12, MCMH was required to monitor Student's placement and services independent of the IEP process.

14. As stated in factual findings 12 and 13, MCMH was impeded in its ability to fully meet its obligation to serve Student because Student's mother prevented MCMH from accessing all the information necessary to properly coordinate services for Student.

15. MCMH has met its burden of proof that Student's mother has refused to consent to treatment and releases of information that prevented MCMH from properly visiting, evaluating and treating Student for available mental health services.

ORDER

1. Student's request for relief is denied.

2. If Student wishes to receive services from MCMH, then within ten days of this decision, Student's mother is ordered to provide consent for treatment and releases of information to MCMH such that MCMH can properly evaluate, visit, treat and coordinate services between Student's residential placement, NPS, the District, and MCMH.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. MCMH prevailed on all issues heard and decided. Because of the extensive testimony and late withdrawal of Student's third issue involving placement at Affinity, MCMH and the District are considered the prevailing party on issue three.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Ed. Code §56505, subd. (k).)

DATED: May 31, 2006

RICHARD M. CLARK
Administrative Law Judge
Special Education Division
Office of Administrative Hearings